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In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. 1148

KENNETH F. HOWARD,

Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BEN T. GRAY
610 Blue Cross Building
Portland, Oregon 97201
Attorney for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-70

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth F. Howard, plaintiff-appellant below, respectfully prays a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon in the above entitled case entered September 30, 1970, affirming a directed verdict and judgment for defendant shipowner against petitioner, a merchant seaman, for damages for personal injuries sustained while serving aboard defendant's vessel.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 91 Adv. Sh. 395, — Or. —, 475 P.2d 65 (1970) and is appended at pages 7 to 11 (Appendix A).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered September 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Can the Supreme Court of the State of Oregon, contrary to the clear rule of law set down in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), deny an injured merchant seaman the right to a jury trial on the issues of Jones Act negligence and unseaworthiness.

STATUTE INVOLVED

46 U.S.C. 688:

"Recovery for injury to or death of seamen. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and

in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

STATEMENT OF THE CASE

Petitioner was injured during the month of November, 1968, while serving as a merchant seaman aboard defendant's vessel. Petitioner filed an action in the Circuit Court of the State of Oregon for the County of Clackamas to recover damages caused by the negligence of defendant through the acts of its employees and agents and the unseaworthiness of the vessel.

Petitioner presented substantial evidence that:

His duties absolutely required him as ship's carpenter to take soundings daily on the ship including the sounding at No. 1 masthouse where he was hurt (Tr. 35, 36, 37, 85, 96).

That chain lashings blocked one passageway entry to this sounding well (Tr. 48). That lumber stacked on the deck of the vessel blocked all other passageways to this sounding well (Tr. 37, 42, 44, 45, 48, 56, 76, 77, 99, 102, 123).

That in order to reach this particular sounding well, petitioner had to leave the relative safety of a catwalk (Tr. 47) on top of a ten foot high stack of lumber (Tr. 42, 43, 45, 46) and go down the side of the lumber (Tr. 59). The vessel was pitching (Tr. 65) and her deck was wet (Tr. 64, 65).

That this was not the usual method of access to sounding wells (Tr. 168).

That habit and custom require such working areas to be kept accessible (Tr. 88, 89, 90, 168, 170, 172, 173).

That in making the perilous descent off the load of lumber, petitioner was injured. That petitioner had requested permission of the Mate to build a ladder, to provide him access, but had been refused (Tr. 50).

Petitioner then went on to prove substantial injuries (Tr. 50-55, 78, 126-156, 161-164), and substantial damages (Tr. 20-23, 29-32, 53).

Petitioner presented a number of witnesses and experts to prove his case.

It is difficult for petitioner to see how he could have made his proof more substantial to show that he was not provided a safe place to work. Yet a verdict was directed against him, and the jury was not allowed to consider either allegations of negligence or unseaworthiness.

REASONS FOR GRANTING THE WRIT

1. That in a Jones Act case the power of decision is vested exclusively in the jury in all but the infrequent cases where fair minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.

2. The Oregon Supreme Court has made it clear that it does not intend to follow the rulings of *Rogers* v. *Missouri Pacific R. Co.*, supra, *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142 (1959), or the suggestions of Justices Black and Brennan dissenting when certiorari was denied one year ago in *Reeves* v. *Pacific Far East Lines, Inc.*, 396 U.S. 908, 90 S. Ct. 412, 24 L. Ed. 2d 184 (November, 1969).

CONCLUSION

The Supreme Court of the State of Oregon having adopted and persisted in the application of an improper standard in reviewing Jones Act cases, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BEN T. GRAY
610 Blue Cross Building
Portland, Oregon 97201
Attorney for Petitioner

APPENDIX A

No. 9479—September 30, 1970

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

HOWARD, *Appellant*, v. AMERICAN MAIL LINE,LTD., *Respondent*.

Appeal from Circuit Court, Clackamas County.

WINSTON L. BRADSHAW, Judge.

Argued and submitted September 10, 1970.

Ben T. Gray, Portland, argued the cause and filed a brief for appellant.

William F. White, Portland, argued the cause for respondent. With him on the brief were White, Sutherland and Gilbertson, Portland.

Before O'CONNELL, Chief Justice, and MCALLISTER, DENECKE, HOLMAN,* TONGUE, HOWELL and MENGLER, Justices.

AFFIRMED.

TONGUE, J.

This is an action for personal injuries sustained by a merchant seaman while employed as a ship's carpenter on the OREGON MAIL. The complaint, in two counts, alleges both that the vessel was unsea-

* Holman, J., did not participate in this decision.

worthy and also, under the Jones Act, that defendant was negligent. Both counts allege that the deck load was stacked too close to a doorway and that no passageway was provided. Plaintiff appeals from a directed verdict and judgment for defendant.

Plaintiff's duties included the making of soundings for water in the bilge at various places on the vessel. One of the sounding wells for this purpose was located back of a ladder near a door from the mast house.

The vessel had a deck load of lumber, which at that point was stacked from eight to ten feet high alongside the mast house, extending veritically from the deck to the top of a three foot "overhang" on the mast house and tight against a steel ladder. A "cat walk" extended fore and aft along the top of the deck load.

In order to provide access to the sounding well a "break" or "gap" was left in the tiers of lumber in front of the doorway. One tier of packaged lumber extended into the bottom of this "gap," leaving a flat surface or "platform" from four to five feet long, from eighteen to twenty inches wide and approximately two and one-half feet high.

Thus, in order to get to the sounding well, it was necessary for plaintiff, after using the "cat walk," to "slide" from the top of the deck load of lumber, a distance of six or eight feet, to the top of that bottom tier of packaged lumber. From there it was necessary for him to step or "slide" down a distance of approximately two and one-half feet to the main deck near

the sounding well. Using that route, plaintiff took soundings at that location once each day.

On the day of the accident, several days after leaving port, the door to the mast house was open, as it had been on some previous occasions, leaving a "threshold ," "sill," or "waterguard" from sixteen to twenty inches high and between eight and ten inches wide. After "sliding" down from the top of the deck load to the bottom tier of lumber (which he concedes "didn't have anything to do with this injury"), and instead of then "sliding" or "stepping" down to the main deck, plaintiff "stepped over" to the top of the "threshhold," "sill," or "waterguard." Plaintiff did so without holding on to the top of the open door. His shoe, which had little or no heel (a lift or "spring" heel) then slipped and he struck his head on the top of the doorway.

Plaintiff testified that he had previously spoken to the mate about placing a "little ladder or something for this area" but that the mate said "we didn't need it."

Defendant offered testimony, which was not denied by plaintiff, that the deck load of lumber was stowed in the customary manner, including the "break" or "gap" left for the access to the sounding well, with its lower "tier" of packaged lumber, to provide what was considered to be a "reasonable step" to the deck. A survey was also made by the National Cargo Bureau at the time the vessel was loaded verifying that the cargo had been stowed in a seaworthy manner.

A more specific description of the area in which the accident occurred, including the means of access to that area, is difficult to reconstruct from the written record, for the reason that much of the descriptive testimony by witnesses for both parties was in terms of pointing to "here" or "there" on very rough sketches.

Plaintiff contends on this appeal that the sufficiency of the evidence must be considered "in the special light" of the Jones Act and the doctrine of the unseaworthiness, under which the "jury's power" is "significantly broader than in ordinary common law negligence," including situations in which "failure to provide proper ingress or egress . . . has played some part in producing the injury."

On the contrary, defendant contends that a shipowner is not "obligated to furnish an accident-free ship," but that his duty is no more than "a duty to furnish a vessel and appurtenances reasonably fit for their intended use" (quoting from *Bourdoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354 (1955)): that what is "reasonable" means what is ordinary or usual under the circumstances; that plaintiff did not deny testimony that this deck load of lumber was stowed in the customary and usual manner; that plaintiff failed to sustain his burden to prove that it was unreasonable, under the facts of this case, to require an able-bodied seaman to step, "slide" or otherwise climb down from a two and one-half foot platform to the deck of a ship, and that plaintiff has cited

no cases in which recovery has been allowed under similar facts.[1]

This court does not necessarily agree with all of the foregoing course of reasoning by defendant. We also recognize that our decisions in such cases are controlled by the "broad doctrines" established by the Supreme Court of the United States. Under the facts of this particular case, however, and under the record as made by the parties in this case, we find no basis for holding that the trial court erred in finding that plaintiff failed to offer any substantial evidence sufficient to establish that this vessel was unseaworthy or that defendant was negligent in either of the respects alleged in his complaint, that is, in "failing to provide a passageway" or in "stacking said deck load too close to the doorway."

Affirmed.

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[1] The case cited by plaintiff closest in point is *Eaton* v. *Long Island Railroad Co.*, 398 F.2d 738 (2d. Cir. 1968), an F.E.L.A. case in which a railroad worker complained that he had not been furnished with a ladder or steps to climb out of a grease pit 38 inches deep. Although affirming a judgment for plaintiff and the denial of a directed verdict, the court pointed out that there was evidence that in other railroad repair yards steps were provided to get in and out of such pits. On the contrary, the same court, in *Richter* v. *Mathiasen's Tanker Industries, Inc.*, 297 F.2d 494 (2d. Cir. 1961), affirmed the dismissal of a suit in admiralty by a seaman for personal injuries in which the seaman fell and was injured in stepping on a bottom shelf to reach an item on a top shelf in taking inventory and complained that a ladder should have been provided for him to reach the top shelf. In that case, however, as in this case, no evidence was offered to show such a practice on any other vessel.

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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

WILLIAM FARNUM WHITE
WHITE, SUTHERLAND & GILBERTSON
1200 Jackson Tower
Portland, Oregon 97205
Attorneys for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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Petitioner's "Statement of the Case" is grossly misleading and in part incorrect.

Petitioner was not injured in going down the side of a ten foot stack of lumber on deck of a ship. He was injured when he stepped from the clean surface of a package of lumber 2½ feet high off of the main deck (Tr. 46) over to the "waterguard" or "thresh-

old" of an open doorway leading into a mast house of the ship. His foot slipped on the clean waterguard and he bumped his head on the overhead of the doorway.

This waterguard across from the package of lumber and parallel to it was about 28 inches long (width of doorway) and eight to ten inches wide (Tr. 63, Def. Ex. B). It was 16 to 18 inches high off the main deck and 2 feet 4 inches away and across from the packaged lumber. Both waterguard and main deck between it and the lumber was clean. The door to the mast house was swung open and secured (Tr. 60, Def. Ex. A, B, C and D. Tr. 62, 68). Petitioner knew of no reason why he could not have put his hand on the open door to help him step down to the main deck or to the waterguard (Tr. 76).

Both before and after the accident Petitioner at no time slipped, although he used the same access to the sounding well (Tr. 70). When the door to the mast house was closed, plaintiff "slid" down to the deck from the package of lumber 2½ feet off the deck (Tr. 72). Before the accident, as he did at time of the accident when the mast house door was open, he would step with his right foot to the waterguard and then with his left foot to the deck between the packaged lumber and doorway (Tr. 72). Petitioner wore shoes with neoprene soles which were concave instead of having heels (Tr. 66).

The accident occurred in morning daylight. Weather was normal with the ship having only a little

pitch and roll (Tr. 66). At time of accident, the OREGON MAIL was four or five days out of Seattle, steaming for Yokohama (Tr. 69).

The record in this case does not bear out Petitioner's statement (Pet. p. 4) that the access provided Petitioner "was not the usual method of access of sounding wells" (Tr. 168). In fact, the contrary was proven to be true (Tr. 201, 203, 216).

The Supreme Court of the State of Oregon in its opinion affirming the verdict directed for respondent more accurately than Petitioner states the facts concerning how Petitioner was injured (Pet. p. 7).

This is that "infrequent" case where fair minded jurors could not reasonably differ over Petitioner's failure to prove either causative negligence or unseaworthiness

How and under what conditions Petitioner bumped his head is beyond dispute as the testimony was exclusively from Petitioner himself. Petitioner accidentally slipped under conditions which were not unusual, difficult or extreme in any sense but reasonable, normal and customary.

Petitioner and not the Supreme Court of the State of Oregon misreads *Rogers* v. *Missouri R. Co.* (1957) 352 U.S. 500. Petitioner would have this Court hold that when an accident occurs aboard ship, irrespective of whether any evidence of negligence or unseaworthiness is shown, the case must go to the jury for it to speculate in the hope it might have compassion for

Petitioner and give him some money, anyway. Such is not the mandate of either the Jones Act, 46 U.S.C. 688 or the general maritime law.

Had Petitioner read the three other cases which were considered by this Court along with *Rogers*, supra, he would have better understood *Rogers*, supra, and more particularly have read the simultaneously considered case of *Herdman* v. *Pennsylvania R. R.* (1957) 352 U.S. 518. In that case this Court affirmed a directed verdict for the defendant railroad with Justice Harlan writing a concurring opinion and Justice Frankfurter dissenting only because he considered the writ of certiorari to have been improvidently granted.

In that case the injured Petitioner was a conductor riding in the caboose of a freight train which, while going slow, came to a sudden non-scheduled stop three miles out of Dayton, Ohio. The stopping threw the conductor against a table and he claimed injury. He sought to go to the jury under the doctrine of *res ipsa loquitur*. This Court affirmed denial of right to jury consideration because there was no evidence that the train stop was made with any special or unusual severity. There was nothing unusual about the event. This is still good law, *New York, New Haven & Hartford R. Co.* v. *Henagan*, (1960) 364 U.S. 441; *Inman* v. *Baltimore & Ohio R. Co.*, (1959) 361 U.S. 138.

At bar, of course, there was no action of any kind save Petitioner's stepping from one place to another

which he had done before and after the accident many times without incident. Here it is hard to imagine a more negligent-free and unseaworthy-free static set of circumstances.

Petitioner in no way attempted to prove that the access he had to the sounding well near the mast house was unusual, different, or non-customary. Thus, whether or not Respondent's proof of the access being usual and customary be considered, no evidence existed to create a fact issue for the jury.

Finally, we consider Petitioner to be impertinent when asserting as reason for a writ that: "The Oregon Supreme Court has made it clear that it does not intend to follow the rulings of *Rogers* v. *Missouri Pacific R. Co.*, supra, *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 . . . ." In its opinion (Pet. p. 11) the Supreme Court of Oregon expressly stated:

> "We also recognize that our decisions in such cases are controlled by the 'broad doctrines' established by the Supreme Court of the United States."

Most recently, in *Epton* v. *American Mail Line*, (July 16, 1970) 91 Or. Adv. Sh. 353, 474 P.2d 516, wherein this Respondent lost on appeal, the Oregon Supreme Court went to extremes to embrace this Court's decisions in a seaman case by accepting as law that which this Respondent had regarded at most only to be dicta.

CONCLUSION

Under the undisputed facts in this simple case, Petitioner as plaintiff failed to present evidence from which a fair minded jury could with reason find Respondent causatively negligent or the OREGON MAIL causatively unseaworthy.

This case presents no federal question of any substance not heretofore determined by this Court. The Supreme Court of the State of Oregon in affirming judgment based upon a directed verdict for shipowner decided this case well within the applicable decisions of this Court. It would be improvident to grant a writ of certiorari in this case.

Respectfully submitted,

WILLIAM FARNUM WHITE
WHITE, SUTHERLAND AND GILBERTSON
1200 Jackson Tower
Portland, Oregon 97205
Attorneys for Respondent